IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 448

DAVID L. MATTHEWS and
MARY ANN MATTHEWS,
Appellants

v.

HAROLD W. HANDLEY,
Governor of the State of Indiana;
EDWIN K. STEERS,
Attorney General of the State of Indiana;
EDWIN W. BEAMAN,
Commissioner, Indiana Department of State Revenue;
WILLIAM J. LOCKS,
Sheriff, St. Joseph County, Indiana,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

APPELLEES' MOTION TO AFFIRM AND SUPPORTING BRIEF

EDWIN K. STEERS,
Attorney General of Indiana,
LLOYD C. HUTCHINSON,
Assistant Attorney General,
Attorneys for Appellees,
219 State House
Indianapolis, Indiana,
MElrose 5-4456

Of Counsel:
GERALD A. KAMM,
St. Joseph Bank Bldg.
South Bend 1, Indiana,
CEntral 3-6118

Central Publishing Co., Inc., Indianapolis, Ind.

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MAY IT PLEASE THE COURT:

Pursuant to Rule 16(1)(c) of this Court, the appellees in the above entitled case respectfully move the Court to

affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinion Below

The opinion and decision of the United States District Court for the Northern District of Indiana, South Bend Division, entered June 13, 1959, as yet unreported, is fully and correctly reproduced in Appellants' Jurisdictional Statement as "Appendix A" thereto.

Jurisdiction

The federal statute under which the decision of the Federal District Court, composed of three judges, is appealable directly to this Court is found in 28 U. S. C. A. Sec. 1253.

However, appellees filed a Motion to Dismiss with the District Court, by which Motion they asserted that said Court does not have jurisdiction over the subject matter for a number of reasons therein stated. Said "Defendants' Motion to Dismiss" together with supporting Memorandum as filed with the District Court is submitted herewith as "Appendix I."

The District Court granted "Defendants' Motion to Dismiss" and concluded its opinion by stating:

> "We are here concerned with two, distinct, sovereign bodies: the State of Indiana and the United States of America. As stated above, we are here presented with a State political question in which the plaintiffs seek to invoke the Equity jurisdiction of this Federal Court. This Court has no jurisdiction to determine this question as the plaintiffs have adequate

remedies at law available to them, and, what is more important, the Federal sovereignty must not and shall not invade this bulwark of State sovereignty.

Perry v. Folsom, 144 Fed. Supp. 874

Defendants' Motion to Dismiss is hereby granted."

Appellees respectfully continue to assert that the Federal Civil Rights Act does not confer jurisdiction upon Federal Courts to invalidate a twenty-six (26) year old state tax statute, because it was enacted by a state legislature whose membership had not been reappropriated every sixth year as provided by that State's Constitution. If such a Court decree as sought by appellants were proper, it would be possible by indirection for Federal Courts to both construe State Constitutions and to effectuate compliance therewith.

This Court has repeatedly and in recent years considered the matter of the reapportionment of the membership of State Legislatures pursuant to provisions of State Constitutions as not being a proper subject for the exercise of federal jurisdiction. Most recent of said decisions are the following:

Radford v. Gary (1956), 145 F. Supp. 541, Affirmed February 25, 1957, 352 U. S. 991, 77 S. Ct. 559;

Kidd v. McCanless, 292 S. W. (2d) 40, Motion to dismiss granted and appeal dismissed December 3, 1956, 352 U. S. 920, 77 S. Ct. 223.

These decisions, believed to be the latest expression of this Court on the general subject of reapportionment of the membership of State Legislatures, and earlier opinions upon which they are based support appellees' contentions

that the Federal Civil Rights Act does not confer federal jurisdiction for the purpose sought by appellants.

The appellants do not rely upon the Fifteenth Amendment to the United States Constitution and there is no allegation of their right to vote having been denied or abridged "on account of race, color, or previous condition of servitude." The appellants have chosen to institute this action because, as stated on page 9 of their Jurisdictional Statement, the Indiana Gross Income Tax Division has demanded of the plaintiffs "the payment of an amount of tax *due and owing* for the year 1955, arising out of the sale by plaintiffs of a residence in the City of South Bend, Indiana. . . ." These appellants do not question the validity of other legislation enacted by the same 1933 General Assembly of Indiana and by other Indiana Legislatures whose enactments would be subject to the same objection.

Other factors affecting the question of jurisdiction and further supporting the District Court's opinion and decision will be treated in the Argument hereto.

Constitutional Provisions and Statutes Involved

The constitutional provisions relied upon by appellants are:

> Indiana Constitution, Article 4, Sections 4 and 5;
> United States Constitution, Article 4, Section 4, Fifth Amendment and Fourteenth Amendment.

The only statute alleged by appellants to be involved is the Indiana Gross Income Tax Law of 1933, as amended. This statute as now amended may be found complete with all amendments to date in Burns' Indiana Statutes Anno-

tated, 1933, Vol. 11, Part 2 (1951 Replacement) Sections 64-2601 to 64-2635 inclusive.

Although not specifically drawn into this action by appellants' complaint, appellants' basic objection upon which they claim the invalidity of the Indiana Gross Income Tax Law would apply to every statute enacted by the 1933 General Assembly of Indiana and also to statutes of other Indiana Legislatures whose enactments would be subject to the same objection.

Questions Presented

Under this portion of Appellants' Jurisdictional Statement (p. 8), it is clear that appellants are attempting by the Federal Civil Rights Statute to have a Federal Court to hold a state statute invalid on the basis of its being unconstitutional because violative of a provision of a State Constitution. As presented, the questions admit that they are based almost solely upon the reapportionment provision "of the Indiana State Constitution."

The basic question then is whether the Federal Civil Rights Act confers jurisdiction upon a Federal Court to construe a provision of a State Constitution and to strike down a statute of that State upon the basis of its being unconstitutional under said State Constitution.

STATEMENT OF FACTS

Appellants are alleged to be citizens of the United States and of the State of Indiana and to be registered voters in said state. There is no allegation in their complaint that they have ever voted or that they have ever been denied the right to vote. There is no allegation in their complaint

as to why they have waited until 1959 to question the constitutionality of the membership of the 1933 General Assembly of the State of Indiana. There is no allegation in their complaint that they have sought relief from the Indiana Legislature itself or from any member thereof. There is no allegation in their complaint that they contested the election processes during elections at which the members of the 1933 Indiana Legislature were elected or at any other time. There is no allegation that appellants have resorted to the processes of the Gross Income Tax Law itself to question their liability under said Act and there is no allegation of any attempt of any kind on the part of appellants to have their rights under the Indiana Constitution adjudicated by State Courts of the State of Indiana.

The appellees are the Governor and Attorney General of the State of Indiana, the Commissioner of the Indiana Department of State Revenue and the Sheriff of St. Joseph County, Indiana. However, from the "Jurisdictional Statement" of appellants the Court might suspect that the appellees had no connection with State or County government and were sued in their individual capacities, if it were not for the opinion and decision of the District Court, being "Appendix A" to said "Jurisdictional Statement." Reference to said opinion and to the record shows clearly that said appellees are sued only in their official capacities.

ARGUMENT

Under that portion of Appellants' "Jurisdictional Statement" entitled "Grounds of Jurisdiction," it is apparent that the sole statutory provisions upon which they rely to establish federal jurisdiction in this matter are those contained in the Federal Civil Rights Act. On Page 2 of said statement the Appellants have categorized their action as being a proceeding "in the nature of a civil rights action . . . ." Appellees deny that the relief sought is properly includible within the jurisdiction conferred on federal courts under the Federal Civil Rights Act.

Of the case authorities cited by Appellants on Pages 4 and 5, it is our opinion that Appellants' cited cases tend to support the Appellees' contention that federal jurisdiction is lacking,—several of said cases having been cited by this Court as authority for denying federal jurisdiction in cases wherein persons have sought to mandate the exercise of apportionment provisions in State Constitutions by means of actions filed in Federal Court. One such leading case is *Colegrove v. Green* (1946), 328 U. S. 548, 66 S. Ct. 1198, 90 L. Ed. 1432. Another type of case authority cited by Appellants is *Terry v. Adams*, 345 U. S. 461, which clearly concerns the situation of the denial of the right to vote based upon race, color, or previous condition of servitude which is expressly prohibited by the Fifteenth Amendment to the Constitution of the United States.

As heretofore stated, Appellants' action does not and cannot raise any question under the Fifteenth Amendment to the United States Constitution, since there has been no denial of the right to vote on account of race, color, or previous condition of servitude. In fact, Appellants have

not been denied the right to vote nor have their *rights* to vote been impaired.

The most which Appellants can claim is that ever present possiblity that a particular citizen's vote is not of equal value and importance with another citizen's vote because of shifts in population. This objection has been noted heretofore by various courts, which have said that exact equality in apportionment cannot be attained even though various apportionment procedures be followed. However, this type of complaint is quite different from the assertion that the civil right to vote has been denied.

In the case of *Radford* v. *Gary* (1956), 145 F. Supp. 541, at p. 544, the Court noted that Plaintiff-Radford was relying upon recent civil rights cases as indicating that this Court had "adopted an entirely different concept of the transcendent effect of the equal protection clauses of the Fourteenth Amendment as applied to state political and social policies." As here, in *Radford* v. *Gary*, *supra*, the strictly civil rights cases were urged as the basis by which the Federal Court could exercise jurisdiction to mandate the apportionment provided by the Constitution of the State of Oklahoma.

The District Court, however, stated, 145 F. Supp., at p. 544: "There is nothing in the so-called civil rights cases indicating a disposition to reverse, modify or repudiate the rule so firmly established in the former cases, . . . ," the District Court specifically having reference to this Court's pronouncement in former cases such as *Colegrove* v. *Green*, 328 U. S. 549, *MacDougall* v. *Green*, 335 U. S. 281 and *South* v. *Peters*, 339 U. S. 276. Upon appeal to this Court, the decision in *Radford* v. *Gary*, as found in 145 F. Supp. 541, was affirmed by this Court on February 25, 1957, this Court citing *Colegrove* v. *Green*, *supra*, and

Kidd v. *McCanless*, 352 U. S. 920, 77 S. Ct. 223. This affirmance may be found in 352 U. S. 991, 77 S. Ct. 559.

The refusal of the Federal District Court to accept jurisdiction in the case of *Radford* v. *Gary*, *supra*, was notwithstanding these facts as stated in the Court's opinion at 145 F. Supp. 542:

> "The essential allegations are that the complainant is a citizen of Oklahoma and resident and voter in the most populous county in the State; that because of a shift in the population since 1910, the county wherein the complainant resides and votes, now has approximately fifteen percent of the total population of the State, with approximately two percent representation in the State Senate and less than four percent in the House of Representatives; that since 1910, the Legislature of the State of Oklahoma has failed to reapportion the State as required by Article V, Sections 9(a) and 10 of the Oklahoma Constitution; that the defendant, Governor of the State, has failed and refused to call a special session of the Legislature for the purpose of effecting legislative compliance with the constitutional mandate; that the Supreme Court of the State of Oklahoma has repeatedly failed and refused to require compliance with the Constitution; and that the complainant is therefore without state remedy."

Unlike the case of *Radford* v. *Gary*, the Appellants herein have made no attempt to obtain relief by means of a State Court remedy or by means of any other State process, said Appellants having apparently deliberately chosen to by pass available legislative and judicial processes of state government.

This Court's past and consistent position with respect to the problem has been stated concisely as follows in the case of *South* v. *Peters* (1950), 339 U. S. 276, 70 S. Ct. 64:

> "The court below dismissed appellants' petition. We affirm. Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

Reference is made to the Civil Rights Act of 1957 and particularly to House Report No. 291 thereon, as contained in U. S. Code Congressional and Administrative News, Vol. 2, Page 1966, at Page 1976. The said House Report emphasizes that with respect to the new Civil Rights Act of 1957, relative to providing means for further securing and protecting the right to vote, the Act has the following limited purpose:

> "The provision is a further declaration of the right to vote for *Federal* offices. It states clearly that it is unlawful for a private individual as well as one acting under color of law to interfere or attempt to interfere with the right to vote at any general, special, or primary election concerning *Federal* offices."

There is nothing in said House Report to indicate that the Civil Rights Act, as newly enacted, reaches the question of apportionment of the membership of a State Legislature as provided by various State Constitutions.

The Appellants' Complaint seems to admit that it is intended as having the purpose of mandating an apportionment in the State of Indiana, for the prayer at the conclusion of Paragraph I of said Complaint requests the Court to restrain the Appellees from collecting or attempting to collect Gross Income Tax from the Appellants herein "*until such time* as the State Legislature enacts legislation reapportioning State, Senatorial, and Representative Districts according to the Constitution of the State of Indiana."

Another ground for denying the claimed jurisdiction of the Federal Court is based upon the Eleventh Amendment to the Constitution of the United States by which a state may not be sued in Federal Court without the state's consent. From the manner in which Appellants' Complaint is stated and the service of process upon Appellees, it is clear that they were all sued in their official capacities, either as Governor or Attorney General of the State of Indiana, or as Commissioner of the Department of State Revenue or as Sheriff of St. Joseph County, Indiana. No claim was made to the District Court that the Appellees were sued personally and not until the filing of Appellants' "Jurisdictional Statement," would it appear that they are suing these Appellees individually, since now Appellants' attorneys have deleted any references in the title of the case and in the body of their statement concerning the official capacities in which each of said Appellees is acting.

Also supporting the District Court's denial of the equitable relief sought is the proposition that there is an adequate remedy in the Gross Income Tax law itself, Sec. 14 thereof, as found in Burns' Indiana Statutes (1959 Supp.), Section 64-2614a, whereby recovery may be had by any person of an amount of Gross Income Tax exacted from him which is illegally collected. Further and apart from the procedure provided by the Gross Income Tax statute itself, the question of the constitutionality of the act may be further raised in state courts as has heretofore been done in *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N.E. 372, and the question of apportionment may be raised in any such action in a state court which Appellants have not undertaken.

With respect to the recovery of amounts of Gross Income Tax illegally collected, as provided in Sec. 14 of

the Gross Income Tax Act, *supra*, said statute consents to such suits only in state courts and this Court has upheld the proposition that state courts constitute the exclusive forum for presenting all questions concerning the liability of a taxpayer under said act. See *Ford Motor Co. v. Department of Treasury et al.* (1943), 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389.

Of possible interest to this Court is the fact that the 1959 General Assembly of the State of Indiana enacted Senate Joint Resolution 13, approved March 13, 1959, being Ch. 410 of the Indiana Acts of 1959, creating a special legislative apportionment sub-committee of the Indiana Legislative Advisory Commission, whose duties as contained in Sections 2 and 3 thereof, are as follows:

> "SEC. 2. The sub-committee, when organized shall proceed to conduct a detailed, exhaustive study and investigation of the problems that have arisen in connection with the enumeration of inhabitants of Indiana; the apportionment and reapportionment of the legislative districts of the General Assembly; the technique of 'gerrymandering' and how to avoid it; cost and methods of enumeration, and possibility of a self-executing method of reapportionment based on the federal census and the federal system of apportionment. The committee shall also conduct a study of the constitutions of the other several states and the Federal Government on this particular subject. Following such studies, the committee shall prepare and submit a proposed constitutional amendment for apportionment of the seats in the General Assembly which in its judgment will be most suitable for, and in the best interest of, the citizens of the State of Indiana."
>
> "SEC. 3. The committee shall make a report of its findings, conclusions and recommendations, both legislative and constitutional to the Indiana Legislative Advisory Commission, together with the recommended

necessary forms of constitutional amendments, on or before September 15, 1960, for transmission to the Ninety-second Indiana General Assembly."

We believe that it is manifest that the questions raised by Appellants are so unsubstantial, as not to need further argument; further, that Appellants' questions have heretofore been decided by prior unaltered, substantially identical and indistinguishable decisions of this Court and on that basis, respectfully move the Court to affirm the opinion and decision of the District Court, as entered by it in this cause on June 13, 1959.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana,
LLOYD C. HUTCHINSON,
Assistant Attorney General,
Attorneys for Appellees,

219 State House
Indianapolis, Indiana
ME 5-4456

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
SOUTH BEND DIVISION

DAVID L. MATTHEWS and
MARY ANN MATTHEWS,
Plaintiffs,

v.

HAROLD W. HANDLEY,
Governor, of the State of Indiana,
EDWIN K. STEERS, Attorney
General of the State of Indiana,
EDWIN W. BEAMAN, Commissioner,
Indiana Department of State Revenue,
WILLIAM J. LOCKS, Sheriff,
St. Joseph County, Indiana,
Defendants.

Civil Action
No. 2540

Defendants' Motion to Dismiss

Come now the defendants, and each of them herein, by Edwin K. Steers, Attorney General of Indiana, and Gerald A. Kaann, attorney for defendant William J. Locks, Sheriff of St. Joseph County, Indiana, and, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, respectfully move the Court to dismiss the above-entitled cause of action, both Paragraphs I and II, for each of the following reasons:

1. The Court lacks jurisdiction over the subject matter because the provisions of the Federal Civil Rights Act, 42 U. S. C. A., Section 1983, 1988, also 28 U. S. C. A., Section

1343(3), and 28 U. S. C. A., Section 2281 *et seq.*, upon which plaintiffs' cause of action is allegedly based and by which plaintiffs allege that this Court has original jurisdiction of this action, apply solely to rights, privileges or immunities secured by the Constitution of the United States and laws of the United States and are not applicable to enforce any provisions of any State Constitution or State statute. The constitutional provisions relating to an enumeration and apportionment, which plaintiffs claim as the basis of their complaint, are contained within the Indiana Constitution and are not secured by any provision of the Constitution of the United States or law of the United States.

2. The Court lacks jurisdiction over the subject matter because the provisions of the Constitution of the United States upon which the complaint allegedly is based do not guarantee any of the rights and privileges alleged by plaintiffs as having been deprived them. The Fifth Amendment to the Constitution of the United States, relied upon by plaintiffs, operates exclusively in restriction of Federal power and has no application to the states. The Fourteenth Amendment to the Constitution of the United States, relied upon by plaintiffs, does not require of any state that it conduct an enumeration, effect an apportionment of representatives in a State General Assembly on the basis of such enumeration, nor does said Fourteenth Amendment guarantee to any person any particular type, nature or extent of representation in State or local government. No other provision of the Constitution of the United States requires any state to conduct an enumeration or effect an apportionment of its representatives in a State General Assembly on the basis of such enumeration.

3. The Court lacks jurisdiction over the subject matter

because this action is in substance and effect a suit against the sovereign state of Indiana, which has not consented to be sued in this Court. The sovereign state of Indiana was granted immunity from suit in this Court by, under and pursuant to the Eleventh Amendment to the Constitution of the United States and the sovereign state of Indiana has not waived said immunity.

4. The Court lacks jurisdiction over the subject matter because, as held in the case of Ford Motor Company v. Department of Treasury, *et al.* (1945), 323 U. S. 459, the Indiana Gross Income Tax Law provides an adequate and exclusive method for seeking relief and for the recovery of amounts illegally collected, and requires resort to state courts.

5. The complaint fails to state a claim upon which relief can be granted to plaintiffs because the plaintiffs have failed to allege and show that an enumeration and apportionment as sought by them would result in any greater representation of themselves or their interests in the Indiana General Assembly than they now have or in any greater representation than had by them at the time of the enactment of the Indiana Gross Income Tax Law.

6. The complaint fails to join an indispensable party, to wit: The Indiana Revenue Board and its component members, said Board being the agency of the State of Indiana charged with the administration and enforcement of the Indiana Gross Income Tax Law.

The above specifications and reasons for dismissing this action are supported herewith by Memorandum, attached hereto and made a part hereof, presented in sequence cor-

responding to the order and number of the above specifications.

Respectfully submitted,
EDWIN K. STEERS,
Attorney General of Indiana,
219 State House
Indianapolis, Indiana,
Attorneys for Defendants.

GERALD A. KAMM,
Attorney at Law,
403-410 St. Joseph Bank Bldg.
South Bend, Indiana,
Attorney for Defendant,
William J. Locks, Sheriff,
St. Joseph County,
Indiana.

MEMORANDUM

1. In their complaint, the plaintiffs assert that this Court has jurisdiction of the cause of action by reason of the provisions contained in 42 U. S. C. A., Section 1983 and 28 U. S. C. A., Section 1343(3) and also refer to the provisions of 28 U. S. C. A., 2281. The first of said sections upon which plaintiffs rely to establish the jurisdiction of this Court over the subject matter, being 42 U. S. C. A., Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Our emphasis)

The next action upon which plaintiffs rely as conferring jurisdiction of this Court over the subject matter is 28 U. S. C. A., Section 1343(3) which provides as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity *secured by the Constitution of the United States or by any Act of Congress* providing for equal rights of citizens or of

all persons within the jurisdiction of the United States;" (Our emphasis)

It is obvious that the above statutory provisions confer jurisdiction upon Federal District Courts with respect only to rights, privileges or immunities secured by the Constitution of the United States and Federal Statutes and do not purport to confer jurisdiction upon Federal Courts to enforce the provisions of any state constitution or state statute.

The third statutory provision to which plaintiffs refer as contained in 28 U. S. C. A., Section 2281, does not concern the matter of conferring jurisdiction on this Court, but merely requires a hearing by a district court of three judges before an interlocutory or permanent injunction restraining the enforcement of any State statute shall be granted, if the Court otherwise has jurisdiction over the subject matter.

Plaintiffs' complaint discloses clearly that the alleged rights which they claim as having been denied them are those referred to in the Constitution of the State of Indiana concerning an enumeration and apportionment, plaintiffs having referred to the provisions of the Indiana Constitution as found in Article 4, Sections 4 and 5. There is no provision of the Federal Constitution requiring any state to conduct an enumeration and effect an apportionment, which are the rights purportedly (although indirectly) which these plaintiffs desire this Court to secure for them. This appears from the prayer at the conclusion of paragraph I of their complaint which requests the Court to restrain the defendants from enforcing a State statute "*until such time* as the said Legislature enacts legislation apportioning State, Senatorial, and Representatives Dis-

tricts according to the Constitution of the State of Indiana."

Court-compelled enumeration and apportionment has previously been sought through Federal Courts which actions have been dismissed by said Courts for the lack of jurisdiction over the subject matter. Reference is made to the case of Perry v. Folsom (1956), 144 F. Supp., 874, in which the Court dismissed an action by which a citizen of Alabama sought to have the Federal District Court compel compliance with sections of the Alabama Constitution providing for a reapportionment of the membership of the Legislature of that state every ten years following each decennial census. As here, plaintiff-Perry averred "that she has been deprived of due process of law, of equal protection of the laws, and of equality of representation under the Laws and Constitutions of the United States and of the State of Alabama * * *." She also insisted that defendants had violated the Civil Rights Statutes, 42 U. S. C. A., 1983. The Court there stated in 144 F. Supp., p. 877 as follows:

> "This Court realizes that exact equality in apportionment cannot be attained. At the same time the Court is acutely aware from judicial knowledge of the fact that the Legislature of Alabama has consistently failed to make any legislative apportionment whatever in compliance with the Constitutional provisions referred to.
>
> "The determination here sought involves the relation of the powers of the National Government to those of the States. The issue presented is of a political nature. Under such circumstances, a federal court should proceed with the greatest possible caution. Ours is a dual system of government. The United States is sovereign in its sphere and the States are likewise sovereign in their spheres. Encroachments

> one upon the other should be studiously avoided and can but lead to unseemly disputes. If the federal courts attempt to exercise the sovereignty vested in the States, as plaintiff here seeks, state sovereignty will suffer serious if not fatal impairment. State sovereignty is not a will-of-the-wisp. It is not a mere abstraction, or untested theory. It is tangible, concrete and real. It is a living principle that marked a new concept of government. It is inherent, it is explicit; and it is basic in our legal fabric. It is to be honored by what it has wrought and treasured for what it is. When our fathers founded these States and established this Union, it was one of the corner posts in the constitutional barriers which they erected to shield their newly won rights from the tyranny of the all-powerful state. No federal court should remove or mar these ancient landmarks, 'which they of old times have set in thine inheritance.' Under the compulsion of the principles stated in the authorities referred to, this Court declines to do so. The Court is, therefore, of the opinion that the several motions to dismiss are well taken and should be granted and that the bill should be dismissed."

See also, to like effect, Colegrove v. Green (1946), 328 U. S. 548, 66 S. Ct. 1198, 90 L. Ed. 1432. Plaintiffs fail to allege that there is any provision of the Constitution of the United States or a federal statute requiring that an enumeration and apportionment be affected with respect to the election of members of the Indiana General Assembly and there is no such federal requirement to constitute the basis of a right, privilege or immunity secured by the Constitution of the United States or by federal statute,—hence no substantial federal question is presented.

2. There are only two provisions of the Constitution of the United States upon which plaintiffs rely as allegedly guaranteeing rights, privileges and immunities which are

allegedly denied said plaintiffs by reason of the failure of the Legislature to have effected an enumeration and apportionment. One of the federal constitutional provisions so relied upon is the Fifth Amendment to the United States Constitution. This amendment clearly has no application, since it has been repeatedly and consistently held that the Fifth Amendment applies only to the Federal Government, restraining its power, and has no application to state governments.

Gaines v. Washington, 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468;

Brock v. North Carolina, 344 U. S. 424, 97 L. Ed. 456, 73 S. Ct. 349.

The only remaining provision of the Federal Constitution upon which plaintiffs rely is stated by them (Complaint, p. 3, paragraph 6) as being "Article 14, Section 1, of the United States Constitution." This obvious error in plaintiffs' complaint clearly refers to the Fourteenth Amendment, Section 1 of the United States Constitution, which, in part, is quoted in paragraph 6 of the complaint. The Fourteenth Amendment of the United States Constitution does not require any state to conduct an enumeration, effect an apportionment or representatives in a state General Assembly on the basis of such enumeration, nor does said Fourteenth Amendment guarantee to any person any particular type, nature or extent of representation in State or local government. No other provision of the United States Constitution requires of any state that it conduct such an enumeration and effect such an apportionment. The provision of the Federal Constitution by which the freedom to vote is guaranteed is the Fifteenth Amendment by which:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

Plaintiffs' complaint does not allege that they or either of them have ever been denied the right to vote; in fact, said complaint, although alleging the plaintiffs are registered voters, does not allege that either of them have ever voted.

3. In substance and effect, Plaintiffs' Complaint constitutes a suit against the sovereign state of Indiana, which has not consented to be sued in this Court, such action being in violation of the Eleventh Amendment to the Constitution of the United States by which the state was granted immunity from suit in Federal Court. It appears from the complaint that the defendants are all sued in their official capacities, either as Governor or Attorney General of the State of Indiana or as Commissioner of the Indiana Department of State Revenue or as Sheriff of St. Joseph County, Indiana. The defendants are not sued personally on the theory they are acting under color of an allegedly unconstitutional statute. By reason of the action having been so commenced, it would appear that the suit is brought against the sovereign state of Indiana in violation of the Eleventh Amendment to the Constitution of the United States. See Chicago Stadium Corporation v. State of Indiana (1954), 123 F. Supp. 783. As hereafter developed, even though the action were otherwise properly brought against the defendants personally, the action could not constitute the basis for the equitable relief sought, for the reason that the Indiana statute of which complaint is made furnishes an adequate and effective method by which plaintiffs may seek relief.

4. Although paragraph 14 of Plaintiffs' Complaint alleges that there is no plain, speedy and efficient remedy at law available to plaintiffs in any court of the State of Indiana, and that they do not have an adequate remedy at law, a study of the applicable Indiana statutes discloses this to be an erroneous allegation. Section 14 of the Indiana Gross Income Tax Law, as amended, as found in Burns' (1957 Supp.), Section 64-2614a provides for the recovery by any person of any amount of gross income tax exacted from him under the terms of the Gross Income Tax Law, which may be in excess of the amount legally due from said taxpayer. Although the Indiana Gross Income Tax statute has heretofore been held to be constitutional, nevertheless, the question of its constitutionality may be further raised in state courts as has been heretofore done in Miles v. Department of Treasury (1935), 209 Ind. 172, 199 N.E. 372.

It should be noted further that said Section 14a, Burns' (1957 Supp.), Section 64-2614a provides explicitly that the state consents to suits for the recovery of taxes illegally collected only in the circuit or superior courts of the county of residence or business location of the taxpayer, or, if the taxpayer has no such residence or business, then in the Marion circuit or superior court,—said consent being confined to suits in said state courts and in no other courts. Said Section (Burns' (1957 Supp.), 64-2614a) provides, in part, as follows:

> "(a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by petition in writing, at any time within three [3] years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to

the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest in a civil action or suit against the department in the circuit or superior court of the county of his residence or business location and if he has no such residence or business location, then in the Marion circuit or superior court. *The state hereby consents to such suits in said courts and no others and said courts are hereby granted exclusive jurisdiction of said suits*: * * *" (Our emphasis)

As held in the case of Ford Motor Company v. Department of Treasury, *et al.* (1943), 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389, since the said Indiana Gross Income Tax Law provides an adequate, effective and exclusive method for seeking relief in state courts for the recovery of amounts illegally collected, said courts constitute the exclusive forum within which questions such as presented by plaintiffs may be presented; said case further holds that the immunity granted the state of Indiana under such circumstances cannot be waived even by the Attorney General.

5. Plaintiffs fail to allege and show in what manner an enumeration and apportionment at this time would result in their having any greater representation of themselves or their interests in the Indiana General Assembly

than they now have or in any greater representation than had by them at the time of the enactment of the Indiana Gross Income Tax Law. There is no showing (except by conclusions alleged) that by reason of any population increase plaintiffs would be "represented" in any greater degree in the General Assembly than they now are if such an enumeration and apportionment were effected. There is no showing (except by conclusion alleged) that the failure to have effected such an enumeration and apportionment discriminates against these plaintiffs to the advantage of any other persons or as to the manner by which the failure to have effected an enumeration and apportionment has worked an inequality against these plaintiffs. There is no showing that these plaintiffs are represented only by those members of the General Assembly for whom they may vote and are not represented in fact by each and every member of the General Assembly. There is no showing that an apportionment "according to the number of male inhabitants above 21 years of age," as stated in the Indiana Constitution, would result in precise equality in the effect of every citizen's vote. Unless precise equality is shown as possible from such an enumeration and apportionment according to male inhabitants, plaintiffs claim is one upon which relief cannot be granted.

6. Pursuant to the provision of the Indiana Acts of 1947, Ch. 10, as found in Burns' (1951 Repl.), Section 64-2901 *et seq.*, all authority, power, duty and jurisdiction to enforce the provisions of the Indiana Gross Income Tax Law were transferred to and are now vested in the Indiana Department of State Revenue, which is governed by the Indiana Revenue Board. If this cause is to be maintained in spite of the infirmities above-cited, this Board which is the governing body in the enforcement of the Gross Income Tax Law is an indispensable party to this action, as are its

component members, and has not been made a party defendant. It is obvious, therefore, that there is a failure to include among the defendants an indispensable party.

WHEREFORE, it is respectfully submitted that, by reason of each of the specifications assigned in the foregoing Defendants' Motion to Dismiss as augmented by this memorandum, the Court should dismiss this action for the reasons: (1) that it does not have jurisdiction over the subject matter; (2) that Plaintiffs' Complaint fails to state a claim upon which relief can be granted and, (3) there is a failure to join an indispensable party.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana,
219 State House
Indianapolis, Indiana,

GERALD A. KAMM,
Attorney at Law,
403-410 St. Joseph Bank Bldg.
South Bend, Indiana.